

Senate Bill No. 542

(By Senators D. Hall, Carmichael, M. Hall, Gaunch, Trump, Blair and Nohe)

[Introduced February 23, 2015; referred to the Committee on the Judiciary.]

A BILL to amend and reenact §46A-2-121, § 46A-2-122, §46A-2-125, §46A-2-126 and §46A-2-128 of the Code of West Virginia, 1931, as amended; to amend and reenact §46A-5-101 and §46A-5-106 of said code; and to amend said code by adding thereto a new section, designated §46A-5-107, all relating to unconscionability; defining "creditor", "debt collector" and "person"; engaging any person in a telephone conversation; failure to disclose a caller's identity; convenient time for communicating with a consumer; unreasonable publication by disclosure of caller's identity; affirmation of an obligation pursuant to bankruptcy law; means of giving notice of a consumer's representation by an attorney; a ringing phone not answered by the consumer does not constitute a prohibited communication; damages and penalties for violation; no action may be brought more than four years after the violation or excess charge occurred; allowing time after discovery to correct an error without liability; adjustment of damages for inflation; and venue of an action or proceeding brought by a consumer.

Be it enacted by the Legislature of West Virginia:

1 That §46A-2-121, §46A-2-122, §46A-2-125, §46A-2-126 and §46A-2-128 of the Code of
2 West Virginia, as amended, be amended and reenacted; that §46A-5-101 and §46A-5-106 of said
3 code be amended and reenacted; and that said code be amended by adding thereto a new section,
4 designated §46A-5-107, all to read as follows:

5 **ARTICLE 2. CONSUMER CREDIT PROTECTION.**

6 **§46A-2-121. Unconscionability; inducement by unconscionable conduct.**

7 (1) With respect to a transaction which is or gives rise to a consumer credit sale, consumer
8 lease or consumer loan, if the court as a matter of law finds:

9 (a) The agreement or transaction ~~to have been unconscionable~~ at the time it was made ~~or to~~
10 ~~have been induced by unconscionable conduct the court may refuse to enforce the agreement, or and~~

11 (b) Any term or part of the agreement or transaction to have been unconscionable at the time
12 it was made, then the court may refuse to enforce the agreement, or may enforce the remainder of
13 the agreement without the unconscionable term or part, or may so limit the application of any
14 unconscionable term or part as to avoid any unconscionable result.

15 (2) If it is claimed or appears to the court that the agreement or transaction or any term or part
16 thereof may be unconscionable, the parties shall be afforded a reasonable opportunity to present
17 evidence as to its setting, purpose and effect to aid the court in making the determination.

18 (3) For the purpose of this section, a charge or practice expressly permitted by this chapter
19 is not unconscionable.

20 **§46A-2-122. Definitions.**

21 For the purposes of this section and sections one hundred twenty-three, one hundred
22 twenty-four, one hundred twenty-five, one hundred twenty-six, one hundred twenty-seven, one

1 hundred twenty-eight, one hundred twenty-nine, and one hundred twenty-nine-a of this article, the
2 following terms shall have the following meanings:

3 (a) "Consumer" means any natural person obligated or allegedly obligated to pay any debt.

4 (b) "Claim" or "debt" means any obligation or alleged obligation of a consumer to pay money
5 arising out of a transaction in which the money, property, insurance or service which is the subject
6 of the transaction is primarily for personal, family or household purposes, whether or not such
7 obligation has been reduced to judgment.

8 (c) "Creditor" means any person who offers or extends credit creating a debt or to whom a
9 debt is owed, including a lender, as such term is defined in W.Va. Code §46A-1-102(23), but such
10 term does not include any person to the extent that such person receives an assignment or transfer
11 of a debt in default solely for the purpose of facilitating collection of such debt for another.

12 ~~(c)~~ (d) "Debt collection" means any action, conduct or practice of soliciting claims for
13 collection or in the collection of claims owed or due or alleged to be owed or due by a consumer.

14 ~~(d) "Debt collector" means any person or organization engaging directly or indirectly in debt~~
15 ~~collection. The term includes any person or organization who sells or offers to sell forms which are,~~
16 ~~or are represented to be, a collection system, device or scheme, and are intended or calculated to be~~
17 ~~used to collect claims.~~

18 (e) "Debt collector" means any person who uses any instrumentality of interstate commerce
19 or the mails in any business the principal purpose of which is the collection of any debts, or who
20 regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be
21 owed or due another. Notwithstanding the exclusion provided by clause (6) of the this paragraph,
22 the term includes any mortgage or other loan servicer, and any creditor who, in the process of

1 collecting his or its own debts, uses any name other than his or its own which would indicate that
2 a third person is collecting or attempting to collect such debts. "Debt collector" does not include --

3 (1) Any officer or employee of a creditor while, in the name of the creditor, collecting debts
4 for such creditor;

5 (2) Any person while acting as a debt collector for another person, both of whom are related
6 by common ownership or affiliated by corporate control, if the person acting as a debt collector does
7 so only for persons to whom it is so related or affiliated and if the principal business of such person
8 is not the collection of debts;

9 (3) Any officer or employee of the United States or any state to the extent that collecting or
10 attempting to collect any debt is in the performance of such officer's or employee's official duties;

11 (4) Any person while serving or attempting to serve legal process on any other person in
12 connection with the judicial enforcement of any debt;

13 (5) A nonprofit organization which, at the request of consumers, performs bona fide
14 consumer credit counseling and assists consumers in the liquidation of their debts by receiving
15 payments from such consumers and distributing such amounts to creditors; and

16 (6) Any person collecting or attempting to collect any debt owed or due or asserted to be
17 owed or due another to the extent such activity: (i) Is incidental to a bona fide fiduciary obligation
18 or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person,
19 including any affiliate of such person; or (iii) concerns a debt obtained by such person as a secured
20 party in a commercial credit transaction involving the creditor.

21 (f) "Person" shall have the meaning set forth in W.Va. Code §46A-1-102(31).

22 **§46A-2-125. Oppression and abuse.**

1 No debt collector shall unreasonably oppress or abuse any person in connection with the
2 collection of or attempt to collect any claim alleged to be due and owing by that person or another.
3 Without limiting the general application of the foregoing, the following conduct is deemed to violate
4 this section:

5 (a) The use of profane or obscene language or language that is intended to unreasonably
6 abuse the hearer or reader;

7 (b) ~~The placement of telephone calls~~ Engaging any person in telephone conversation without
8 disclosure of the caller's identity and with the intent to annoy, harass or threaten any person at the
9 called number;

10 (c) Causing expense to any person in the form of long distance telephone tolls, telegram fees
11 or other charges incurred by a medium of communication, by concealment of the true purpose of the
12 communication; and

13 (d) ~~Causing a telephone to ring or~~ Engaging any person in telephone conversation repeatedly
14 or continuously, or at unusual times or at times known to be inconvenient, with intent to annoy,
15 abuse, oppress or threaten any person at the called number. In the absence of knowledge of
16 circumstances to the contrary, a debt collector shall assume that the convenient time for
17 communicating with a consumer is after 8 o'clock antemeridian and before 9 o'clock postmeridian,
18 local time at the consumer's location.

19 **§46A-2-126. Unreasonable publication.**

20 No debt collector shall unreasonably publicize information relating to any alleged
21 indebtedness or consumer. For purposes of this section, a debt collector does not unreasonably
22 publicize information relating to any alleged indebtedness by identifying themselves to the debtor

1 by name, identifying their employer by name, if expressly requested by the debtor, or by providing
2 a telephone number or other contact information to the debtor. Without limiting the general
3 application of the foregoing, the following conduct is deemed to violate this section:

4 (a) The communication to any employer or his or her agent before judgment has been
5 rendered of any information relating to an employee's indebtedness other than through proper legal
6 action, process or proceeding;

7 (b) The disclosure, publication, or communication of information relating to a consumer's
8 indebtedness to any relative or family member of the consumer if such person is not residing with
9 the consumer, except through proper legal action or process or at the express and unsolicited request
10 of the relative or family member;

11 (c) The disclosure, publication or communication of any information relating to a consumer's
12 indebtedness to any other person other than a credit reporting agency, by publishing or posting any
13 list of consumers, commonly known as "deadbeat lists," except lists to prevent the fraudulent use of
14 credit accounts or credit cards, by advertising for sale any claim to enforce payment thereof, or in
15 any manner other than through proper legal action, process or proceeding; and

16 (d) The use of any form of communication to the consumer, which ordinarily may be seen
17 by any other persons, that displays or conveys any information about the alleged claim other than the
18 name, address and phone number of the debt collector.

19 Nothing in this chapter prohibits a creditor or debt collector from communicating with any
20 person other than the consumer for the purpose of acquiring or confirming the consumer's place of
21 abode and telephone numbers. For purposes of this chapter, "communication" or "communicating"
22 or any derivation of those terms does not include the filing of a complaint or other document,

1 pleading or filing with any court.

2 **§46A-2-128. Unfair or unconscionable means.**

3 No debt collector may use unfair or unconscionable means to collect or attempt to collect any
4 claim. Without limiting the general application of the foregoing, the following conduct is deemed
5 to violate this section:

6 (a) The seeking or obtaining of any written statement or acknowledgment in any form that
7 specifies that a consumer's obligation is one incurred for necessities of life where the original
8 obligation was not in fact incurred for such necessities;

9 (b) The seeking or obtaining of any written statement or acknowledgment in any form
10 containing an affirmation of any obligation by a consumer who has been declared bankrupt, ~~without~~
11 ~~clearly disclosing the nature and consequences of such affirmation and the fact that the consumer~~
12 ~~is not legally obligated to make such affirmation~~ except where such affirmation is obtained pursuant
13 to applicable bankruptcy law;

14 (c) The collection or the attempt to collect from the consumer all or any part of the debt
15 collector's fee or charge for services rendered: *Provided*, That attorney's fees, court costs and other
16 reasonable collection costs and charges necessary for the collection of any amount due upon
17 delinquent educational loans made by any institution of higher education within this state may be
18 recovered when the terms of the obligation so provide. Recovery of attorney's fees and collection
19 costs may not exceed thirty-three and one-third percent of the amount due and owing to any such
20 institution: *Provided, however*, That nothing contained in this subsection shall be construed to limit
21 or prohibit any institution of higher education from paying additional attorney fees and collection
22 costs as long as such additional attorney fees and collection costs do not exceed an amount equal to

1 five percent of the amount of the debt actually recovered and such additional attorney fees and
2 collection costs are deducted or paid from the amount of the debt recovered for the institution or paid
3 from other funds available to the institution;

4 (d) The collection of or the attempt to collect any interest or other charge, fee or expense
5 incidental to the principal obligation unless such interest or incidental fee, charge or expense is
6 expressly authorized by the agreement creating or modifying the obligation and not otherwise
7 prohibited by statute or regulation;

8 (e) Any communication with a consumer ~~whenever it appears~~ made more than seventy-two
9 hours after the debt collector (or creditor) receives written notice, either on paper or electronically,
10 from the consumer or his or her attorney, that the consumer is represented by an attorney specifically
11 with regard to the subject debt. To be effective under this subsection, such notice must clearly state
12 ~~and the attorney's name, and address~~ and telephone number. ~~are known, or could be easily~~
13 ~~ascertained;~~ Communication with a consumer is not prohibited under this subsection if unless the
14 attorney fails to answer correspondence, return phone calls or discuss the obligation in question, or
15 if unless the attorney consents to direct communication with the consumer. Regular account
16 statements provided to the consumer and notices required to be provided to the consumer pursuant
17 to applicable law do not constitute prohibited communications; and

18 (f) When the debt is beyond the statute of limitations for filing a legal action for collection,
19 failing to provide the following disclosure informing the consumer in its initial written
20 communication with such consumer that:

21 (1) When collecting on a debt that is not past the date for obsolescence provided for in
22 Section 605(a) of the Fair Credit Reporting Act, 15 U. S. C. 1681c: "The law limits how long you

1 can be sued on a debt. Because of the age of your debt, (INSERT OWNER NAME) cannot sue you
 2 for it. If you do not pay the debt, (INSERT OWNER NAME) may report or continue to report it to
 3 the credit reporting agencies as unpaid"; and

4 (2) When collecting on debt that is past the date for obsolescence provided for in Section
 5 605(a) of the Fair Credit Reporting Act, 15 U. S. C. 1681c: "The law limits how long you can be
 6 sued on a debt. Because of the age of your debt, (INSERT OWNER NAME) cannot sue you for it
 7 and (INSERT OWNER NAME) cannot report it to any credit reporting agencies.

8 **ARTICLE 5. CIVIL LIABILITY AND CRIMINAL PENALTIES.**

9 **§46A-5-101. Effect of violations on rights of parties; limitation of actions.**

10 (1) If a creditor or debt collector has violated the provisions of this chapter applying to
 11 ~~collection of excess charges~~, security in sales and leases, disclosure with respect to consumer leases,
 12 receipts, statements of account and evidences of payment, limitations on default charges, assignment
 13 of earnings, authorizations to confess judgment, illegal, fraudulent or unconscionable conduct, any
 14 prohibited debt collection practice, or restrictions on interest in land as security, assignment of
 15 earnings to regulated consumer lender, security agreement on household goods for benefit of
 16 regulated consumer lender, and renegotiation by regulated consumer lender of a loan discharged in
 17 bankruptcy, the consumer has a cause of action to recover: (a) Actual damages; and in addition a
 18 ~~right in an action to recover from the person violating this chapter a penalty in an amount determined~~
 19 ~~by the court not less than one hundred dollars nor more than one thousand dollars.~~ (b) (1) In the case
 20 of an action by an individual, such additional damages as the court may allow, but such additional
 21 damages awarded under this article shall not exceed \$1,000 per consumer credit sale, consumer lease
 22 or consumer loan, not per violation; or (2) in the case of a class action: (i) Such amount for each

1 named plaintiff as could be recovered under subparagraph (a); and (ii) such amount as the court may
2 allow for all other class members, without regard to a minimum individual recovery, not to exceed
3 the lesser of \$500,000 or 1 percent of the net worth of the creditor or debt collector, as applicable.

4 With respect to violations arising from consumer credit sales or consumer loans ~~made pursuant to~~
5 ~~revolving charge accounts or revolving loan accounts, or from sales as defined in article six of this~~
6 ~~chapter~~, no action pursuant to this subsection may be brought more than four years after the
7 violations occurred. ~~With respect to violations arising from other consumer credit sales or consumer~~
8 ~~loans, no action pursuant to this subsection may be brought more than one year after the due date of~~
9 ~~the last scheduled payment of the agreement.~~

10 (2) If a creditor has violated the provisions of this chapter respecting authority to make
11 regulated consumer loans, the loan is void and the consumer is not obligated to pay either the
12 principal or the loan finance charge. If he or she has paid any part of the principal or of the finance
13 charge, he or she has a right to recover in an action the payment from the person violating this
14 chapter or from an assignee of that person's rights who undertakes direct collection of payments or
15 enforcement of rights arising from the debt. With respect to violations arising from regulated
16 consumer loans made pursuant to revolving loan accounts, no action pursuant to this subsection may
17 be brought more than four years after the violation occurred. With respect to violations arising from
18 other regulated consumer loans, no action pursuant to this subsection may be brought more than one
19 year after the due date of the last scheduled payment of the agreement pursuant to which the charge
20 was paid.

21 (3) A consumer is not obligated to pay a charge in excess of that allowed by this chapter, and
22 if he or she has paid an excess charge he or she has a right to a refund. A refund may be made by

1 reducing the consumer's obligation by the amount of the excess charge. If the consumer has paid an
2 amount in excess of the lawful obligation under the agreement, the consumer may recover in an
3 action the excess amount from the person who made the excess charge or from an assignee of that
4 person's rights who undertakes direct collection of payments from or enforcement of rights against
5 the consumer arising from the debt.

6 (4) If a creditor has contracted for or received a charge in excess of that allowed by this
7 chapter, the consumer may, in addition to recovering such excess charge, also recover from the
8 creditor or the person liable in an action ~~a penalty in an amount determined by the court not less than~~
9 ~~one hundred dollars nor more than one thousand dollars.~~ (a) Actual damages; and (b) (1) In the case
10 of an action by an individual, such additional damages as the court may allow, but such additional
11 damages awarded under this article shall not exceed \$1,000 per consumer credit sale, consumer lease
12 or consumer loan, not per violation; or (2) in the case of a class action: (i) Such amount for each
13 named plaintiff as could be recovered under subparagraph (a); and (ii) such amount as the court may
14 allow for all other class members, without regard to a minimum individual recovery, not to exceed
15 the lesser of \$500,000 or one percent of the net worth of the creditor or the person liable, as
16 applicable. With respect to excess charges arising from consumer credit sales or consumer loans
17 ~~made pursuant to revolving charge accounts or revolving loan accounts, no action pursuant to this~~
18 ~~subsection may be brought more than four years after the time the excess charge was made. With~~
19 ~~respect to excess charges arising from other consumer credit sales or consumer loans no action~~
20 ~~pursuant to this subsection may be brought more than one year after the due date of the last~~
21 ~~scheduled payment of the agreement pursuant to which the charge was made.~~

22 (5) Except as otherwise provided, a violation of this chapter does not impair rights on a debt.

1 (6) If an employer discharges an employee in violation of the provisions prohibiting
2 discharge, the employee may within ninety days bring a civil action for recovery of wages lost as a
3 result of the violation and for an order requiring the reinstatement of the employee. Damages
4 recoverable shall not exceed lost wages for six weeks.

5 (7) A creditor has no liability for a penalty under subsection (1) or subsection (4) of this
6 section if within ~~fifteen~~ forty-five days after discovering an error, and prior to the institution of an
7 action under this section or the receipt of written notice of the error, the creditor notifies the person
8 concerned of the error and corrects the error: (a) Within fifteen days if the error affects no more than
9 two consumers; or (b) within sixty days if the error affects more than two consumers. If the violation
10 consists of a prohibited agreement, giving the consumer a corrected copy of the writing containing
11 the error is sufficient notification and correction. If the violation consists of an excess charge,
12 correction shall be made by an adjustment or refund.

13 (8) If the creditor establishes by a preponderance of evidence that a violation is unintentional
14 or the result of a bona fide error of fact notwithstanding the maintenance of procedures reasonably
15 adapted to avoid any such violation or error, no liability is imposed under subsections (1), (2) and
16 (4) of this section, and the validity of the transaction is not affected.

17 **§46A-5-106. Adjustment of damages for inflation.**

18 In any claim brought under this chapter applying to illegal, fraudulent or unconscionable
19 conduct or any prohibited debt collection practice, the court may adjust the damages awarded
20 pursuant to section one hundred one of this article to account for inflation from ~~the time that the~~
21 ~~West Virginia consumer credit and protection act became operative, specifically 12:01 a.m. on the~~
22 ~~first day of September, one thousand nine hundred seventy-four,~~ September 1, 2015 to the time of

1 the award of damages in an amount equal to the consumer price index. Consumer price index means
2 the last consumer price index for all consumers published by the United States department of labor.

3 **§46A-5-107. Venue.**

4 Any civil action or other proceeding brought by a consumer to recover actual damages or a
5 penalty, or both, from a debt collector or a creditor, founded upon illegal, fraudulent or
6 unconscionable conduct, or prohibited debt collection practice, or both, shall be brought either in the
7 circuit court of the county in which the plaintiff has his or her legal residence at the time of the civil
8 action, or in the circuit court of the county in which the debt collector or a creditor has its principal
9 place of business or, if the debt collector or creditor is an individual, in the circuit court of the county
10 of his or her legal residence.

NOTE: The purpose of this bill is to reform provisions of the West Virginia Consumer Credit and Protection Act relating to collection of indebtedness, and to make the act more consistent with the federal Fair Debt Collection Practices Act.

Strike-throughs indicate language that would be stricken from the present law, and underscoring indicates new language that would be added.

§46A-5-107 is new; therefore, strike-throughs and underscoring have been omitted.